

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NATIONAL PRODUCTS, INC.,

Civil Case No. CV08-0049-JLR

Plaintiff,

**PLAINTIFF NATIONAL  
PRODUCTS, INC.'S MOTION TO  
REOPEN CASE AND MOTION FOR  
EXPEDITED DISCOVERY**

v.

GAMBER-JOHNSON, LLC,

**Noted on Motion Calendar:  
Friday, May 2, 2008**

Defendant.

**ORAL ARGUMENT REQUESTED**

**I. INTRODUCTION**

This is a case for false advertising. Plaintiff National Products, Inc. ("NPI") is in need of urgent discovery. After several unsuccessful attempts to resolve this dispute with Defendant Gamber-Johnson, LLC ("Gamber"), NPI is now forced to proceed with its request in the complaint for preliminary injunction. The need to reopen this case and pursue expedited discovery became apparent last month, after settlement talks failed and NPI learned that Gamber was continuing to distribute a 25-minute marketing infomercial DVD, entitled "The Mounting Evidence," at a March trade show. This infomercial also appears on Gamber's website and is replete with false and misleading statements. This development

comes despite Gamber’s early indications in settlement discussions that distribution of the offending DVD and the infomercial’s use on the Gamber website would cease.

Continued distribution of “The Mounting Evidence” will cause irreparable damage to NPI. Discovery is needed on an expedited basis to learn what, if any, facts exist to support highly damaging statements made in that infomercial. Requests for expedited discovery are routinely granted in cases like this, where a plaintiff alleges irreparable harm to its business reputation. The time required for this discovery is short. The scope of this discovery is narrow. And, the burden associated with this discovery is light. In short, Gamber has little reason to delay providing documents and answering short, pointed questions seeking facts underlying statements made in “The Mounting Evidence” infomercial.

## **II. FACTUAL BACKGROUND**

In 1992, Jeffrey Carnevali (“Carnevali”) invented a mounting device used most commonly in cars, planes, and boats.<sup>1</sup> Called the “RAM mount,” this device was the first of its kind to use a double-socket arm assembly with a clamp and rubber balls. The RAM mount enjoyed unparalleled success upon its release. There were many imitators. In fact, one imitation was produced by Gamber. In 2006, Gamber admitted to infringing Carnevali’s U.S. Patent No. 5,845,885, covering the RAM mount. *See* Amended Consent Judgment, *Nat’l Prods., Inc. v. Gamber Johnson LLC*, No. CV04-2524P (W.D. Wash. Oct. 2, 2006). This history partially explains the motivation for Gamber’s damaging infomercial discussed in detail *infra*.

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<sup>1</sup> Supporting Declaration of NPI founder Jeffrey D. Carnevali ¶ 2 (“Carnevali ¶ \_\_”) filed herewith in support of this motion.

1 Carnevali also made a number of mounting systems to complement the RAM mount  
2 design. Many of these mounts include connectors designed to hold different types of devices  
3 like cellular phones, GPS devices, and notebook computers.

4 NPI's RAM mounting systems sell extremely well to companies with commercial  
5 vehicle fleets, police departments, the military, and sportsmen.<sup>2</sup> Gamber's "The Mounting  
6 Evidence" infomercial attempts to convince these individuals (and others) to buy from  
7 Gamber instead of NPI because, according to Gamber's infomercial, NPI's products are  
8 inferior. Gamber's infomercial is distributed through the internet and on DVD, presenting a  
9 purported "analysis" of several different mounting systems by a purported "expert." In  
10 addition, "The Mounting Evidence" is disseminated by Gamber in video segments that are  
11 not only presented on a website located at <www.themountingevidence.com>, but also  
12 prominently featured on the home page of Gamber's website, located at  
13 <www.gamberjohnson.com>.

14 "The Mounting Evidence" is hosted by "Dave Long, Airbag Detective" who presents  
15 himself as an independent and objective safety expert.<sup>3</sup> Long touts his "decade" of air bag  
16 experience and the fact that he has conducted investigations of "hundreds of mounting  
17 installations in vehicles." Throughout his "investigation," Long refers to Gamber as "they,"  
18 "them," and "these guys"—the whole purpose being to cause consumers to believe that  
19 Long's "investigation" was independently conducted outside the auspices of Gamber. Long  
20 also suggests that his conclusions are supported by scientifically conducted studies and that  
21 he himself possesses the necessary qualifications to evaluate these studies. Contrary to  
22 Gamber's representations, from all indications, Long is *not* an expert on the construction or

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23 <sup>2</sup> Carnevali ¶ 3.

24 <sup>3</sup> Complaint ¶ 19.

1 safety of mounting devices, but a paid narrator following a script written by Gamber's public  
2 relations firm.<sup>4</sup> According to Long's biographical information, he is a nurse who provides  
3 lectures on airbag safety.<sup>5</sup> His biography indicates a lack of relevant engineering experience  
4 that would permit him to analyze mechanical characteristics of mounting devices such as  
5 structural integrity or stability. It is under these false pretenses that the infomercial presents a  
6 number of "facts," most of which are categorically false, as set forth in NPI's complaint.<sup>6</sup>

7 In December 2007, NPI started receiving reports from distributors in the field that the  
8 misrepresentations in "The Mounting Evidence" were having a negative impact on NPI's  
9 RAM mount sales.<sup>7</sup> NPI initiated an investigation into the allegations made in the video  
10 shortly thereafter and consulted with counsel in December 2007 regarding any potential  
11 claims. Suit was filed in the early part of January 2008.

12 After suit was filed, Gamber immediately indicated that it would be willing to cease  
13 distribution of the offending ads, but as discussions progressed, Gamber tied its offer to  
14 settling an unrelated patent case.<sup>8</sup> Gamber moved for consolidation of this case with the  
15 separate case for patent infringement currently before The Honorable Richard A. Jones (No.  
16 07-1985-RAJ). Various motions are pending in the case before Judge Jones, and the parties  
17 recently completed their last rounds of briefing on March 25, 2008.

18 The need to reopen this case and pursue expedited discovery became apparent just  
19 last month, after settlement discussions failed and Carnevali discovered that Gamber was

20 \_\_\_\_\_  
21 <sup>4</sup> The public relations firm behind "The Mounting Evidence" infomercial is Thomas Marks & Associates.  
Declaration of Mark Walters ¶ 4, Ex. E ("Walters ¶ \_\_\_\_").

22 <sup>5</sup> Walters ¶ 6, Exh. F.

23 <sup>6</sup> For the purposes of this motion, NPI need not go into detail regarding each of the false statements made in  
"The Mounting Evidence" infomercial. The allegations are set forth in the Complaint at ¶¶ 19-27. In essence,  
the infomercial falsely describes NPI's mounts in order to claim superior construction and/or function of the  
Gamber mounts.

24 <sup>7</sup> Carnevali ¶¶ 6-7.

<sup>8</sup> Walters ¶ 5.

1 continuing to distribute “The Mounting Evidence” DVD at the Dynamics/Itronix Trade  
2 Show.<sup>9</sup>

### 3 **III. LEGAL STANDARD**

4 Fed. R. Civ. P. 26, among others, provides district courts with broad power to permit  
5 expedited discovery in appropriate cases. *Benham Jewelry Corp. v. Aron Basha Corp.*, 45  
6 U.S.P.Q. 2d 1078, 1094 (S.D.N.Y. 1997). Expedited discovery is routinely granted in  
7 actions involving infringement and unfair competition. *Id.* (citing *Revlon Consumer Prods.*  
8 *Corp. v. Jennifer Leather Broadway*, 858 F. Supp. 1268, 1269 (S.D.N.Y. 1994), *aff’d*, 57  
9 F.3d 1062 (2d Cir. 1995); *Francis S. Denney, Inc. v. I.S. Lab, Inc.*, 737 F. Supp. 247, 248  
10 (S.D.N.Y. 1990)); *see also* Fed. R. Civ. P. 30(a)(2)(A)(iii) (party may seek leave of court to  
11 take depositions before time specified in Fed. R. Civ. P. 26(d)); Fed. R. Civ. P. 34(b)(2)(A)  
12 (court may shorten time to respond to requests for production).

13 Expedited discovery is particularly appropriate where a plaintiff is seeking injunctive  
14 relief because of the expedited nature of injunctive proceedings. *See Yokohama Tire Corp. v.*  
15 *Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613 (D. Ariz. 2001) (citing *Ellsworth Assocs., Inc.*  
16 *v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996)); *see also Optic-Elec. Corp. v. United*  
17 *States*, 683 F. Supp. 269, 271 (D.D.C. 1987); *Onan Corp. v. United States*, 476 F. Supp. 428,  
18 434 (D. Minn. 1979)). Courts order expedited discovery where it would “better enable the  
19 court to judge the parties’ interests and respective chances for success on the merits” of a  
20 preliminary injunction motion. *Yokohama*, 202 F.R.D. at 613 (quoting *Edudata Corp. v.*  
21 *Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984), *aff’d in part, rev’d in*  
22 *part on other grounds*, 746 F.2d 429 (8th Cir. 1985); citing *Ellsworth*, 917 F. Supp. at 844

23  
24 <sup>9</sup> Carnevali Decl. ¶¶ 9-10.

1 (ordering expedited discovery to “expedite resolution of [plaintiffs’] claims for injunctive  
2 relief”)).

#### 3 **IV. ARGUMENT**

##### 4 **A. The Nature of NPI’s Claims Provide Good Cause to Expedite Discovery.**

5 Good cause exists in this case to grant expedited discovery. District courts in the  
6 Ninth Circuit apply the “good cause” standard in determining whether discovery should be  
7 expedited. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275 (N.D. Cal.  
8 2002) (“The Court . . . is persuaded that the more flexible good cause standard applied  
9 in Yokohama . . . and other cases is the appropriate standard under Rule 26(d).”); *Yokohama*,  
10 202 F.R.D. at 614 (“Absent credible authority to the contrary, the Court adopts a good cause  
11 standard to warrant the granting of any expedited discovery prior to the Rule 26(f) scheduling  
12 conference . . . .”); *UMG Recordings, Inc. v. Does*, No. 06-0652, 2006 U.S. Dist. LEXIS  
13 32821, at \*3 (N.D. Cal. Mar. 6, 2006) (“Expedited discovery under Rule 45 is appropriate  
14 when good cause for the discovery, in consideration of the administration of justice,  
15 outweighs the prejudice to the responding party.” (citing *Semitool*, 208 F.R.D. at 276));  
16 *Cartwright v. Viking Indus., Inc.*, No. 2:07-CV-02159-FCD-EFB, 2008 U.S. Dist. LEXIS  
17 10240, at \*7 (E.D. Cal. Feb. 12, 2008) (“Courts may order expedited discovery before a Rule  
18 26(f) conference upon a showing of good cause.” (citing *Semitool*, 208 F.R.D. at 276));  
19 *Invitrogen Corp. v. President & Fellows of Harvard Coll.*, No. 07-cv-0878-JLS (POR), 2007  
20 U.S. Dist. LEXIS 74282, at \*6 (S.D. Cal. Oct. 2, 2007) (“A party seeking expedited  
21 discovery must demonstrate ‘good cause’ for the early discovery.” (citing *Semitool*, 208  
22 F.R.D. at 276; *Yokohama*, 202 F.R.D. at 614)); *see also Pod-Ners, LLC v. N. Feed & Bean of*  
23

1 *Lucerne Ltd. Liab. Co.*, 204 F.R.D. 675, 676 (D. Colo. 2002) (stating that Fed. R. Civ. P.  
2 26(d) allows courts to order expedited discovery upon a showing of good cause).

3 Courts often recognize that “good cause is frequently found in cases involving  
4 infringement and unfair competition claims.” *Pod-Ners*, 204 F.R.D. at 676 (citing *Benham*  
5 *Jewelry*, 45 U.S.P.Q. 2d at 1094). Particularly where the party moving for expedited  
6 discovery requests existing documents and physical inspections that are relevant and  
7 discoverable under the complaint, the court will likely find good cause for allowing  
8 expedited discovery. *See Semitool*, 208 F.R.D. at 277.

9 NPI claims irreparable harm as a result of Gamber’s violation of the Lanham Act, 15  
10 U.S.C § 1125(a), as well as other laws. (Complaint ¶¶ 28-37). The nature of the injury  
11 alleged in NPI’s complaint cannot be wholly remedied by monetary damages; it includes  
12 damaged goodwill and reputation, harm typical of intellectual property cases and usually  
13 remedied by injunctive relief. *See, e.g., Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th  
14 Cir. 1992) (“The loss of customer goodwill often amounts to irreparable injury because the  
15 damages flowing from such losses are difficult to compute.”); *Opticians Ass’n of Am. v.*  
16 *Indep. Opticians of Am.*, 920 F.2d 187, 196 (3d Cir. 1990) (“Potential damage to reputation  
17 constitutes irreparable injury for the purpose of granting a preliminary injunction in a  
18 trademark case.”); *Pepsico, Inc. v. Cal. Sec. Cans*, No. CV-02-5321 NM (RZx), 2002 U.S.  
19 Dist. LEXIS 22404, at \*22-23 (C.D. Cal. Nov. 4, 2002) (“Trademark counterfeiting,  
20 trademark infringement, unfair competition, dilution and false advertising by their very  
21 nature result in irreparable injury since the attendant loss of goodwill, reputation and business  
22 cannot adequately be quantified and victims cannot be compensated adequately. For this  
23 reason, therefore, Plaintiffs are entitled to permanent injunctive relief.” (citations omitted));  
24

1 *Corp. Express Office Prods., Inc. v. Martinez*, No. CV-SA02-87 AHS (ANX), 2002 U.S.  
2 Dist. LEXIS 21310, at \*13 (C.D. Cal. Mar. 8, 2002) (noting, in granting a preliminary  
3 injunction, that “[i]ntangible injuries, such as damage to a business's goodwill, may support a  
4 finding of irreparable injury”). NPI’s claims for injunctive relief based on the risk of  
5 irreparable harm establish the necessary good cause for an order expediting discovery. This is  
6 especially true given Gamber’s decision to continue distribution of the infomercial while this  
7 case is pending.

8  
9 **B. The Discovery Sought Is Narrowly Focused and Will Not Prejudice  
Gamber**

10 NPI has prepared one set of narrowly tailored Requests for Production under Rule 34,  
11 and it seeks just three expedited depositions: (1) a deposition from Gamber relating to the  
12 infomercial; (2) a deposition of the infomercial host, Mr. David Long; and (3) a deposition of  
13 Gamber’s public relations firm, Thomas Marks & Associates. These proposed discovery  
14 requests are attached as Exhibits A, B, C, and D to the declaration of NPI’s undersigned  
15 counsel. Counsel for NPI believes that all of the requested discovery can be completed in a  
16 period of one month, where documents are produced within two weeks of the Court’s order  
17 authorizing expedited discovery.<sup>10</sup>

18 Gamber will suffer no substantial hardship, nor be prejudiced, by an order granting  
19 expedition of the narrowly tailored requested discovery. *See Semitool*, 208 F.R.D. at 276  
20 (reasoning that expedited discovery is permissible where the need for it, “in consideration of  
21 the administration of justice, outweighs the prejudice to the responding party”). The accused  
22 infomercial purports to have conducted a comparative analysis. NPI merely seeks facts  
23

24 <sup>10</sup> Walters ¶ 3.



1 supporting statements made in the infomercial.<sup>11</sup> Indeed, Gamber should have already  
2 gathered the relevant information and documents because it filed an answer to NPI's  
3 complaint several weeks ago denying all liability. Documents supporting Gamber's denials  
4 in the answer should already be available. There is no good reason to delay producing these  
5 documents where NPI continues to suffer irreparable harm from Gamber's continued  
6 distribution of the infomercial.

7  
8 **V. CONCLUSION**

9 For all the foregoing reasons, NPI respectfully requests an order reopening the case  
10 and permitting expedited discovery into the allegations of false advertising.

11 Respectfully submitted,

12 DARBY & DARBY P.C.

13 Dated: April 17, 2008

14 By: s/ David K. Tellekson

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23  
24 <sup>11</sup> Although it is doubtful that independent analysis exists, NPI has requested any such tests from Gamber. If these tests existed and supported Gamber's position, they would likely have been turned over by this point.

**CERTIFICATE OF SERVICE**

I, Sharie L. Parks, hereby certify that on April 17, 2008, I caused the foregoing  
**PLAINTIFF NATIONAL PRODUCTS, INC.'S MOTION TO REOPEN CASE AND  
MOTION FOR EXPEDITED DISCOVERY** to be served on the following parties as  
indicated below:

Mark S. Parris Molly Terwilliger HELLER EHRMAN LLP 701 Fifth Avenue, Ste. 6100 Seattle, WA 98104-7098  <i>Attorneys for Defendant Gamber Johnson LLC</i>	<input type="checkbox"/> By United States Mail <input checked="" type="checkbox"/> <b>By Legal Messenger</b> <input checked="" type="checkbox"/> <b>By Electronic CM/ECF</b> <input type="checkbox"/> By Overnight Express Mail <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Email [by agreement of counsel]
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DATED: April 17, 2008

s/ Sharie L. Parks  
for David K. Tellekson, WSBA No. 33523  
Robert L. Jacobson, WSBA No. 30838  
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